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No. 00-1314

Supreme Court, U.S.
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In The
Supreme Court of the United States

SYLVIA RODRIGUEZ, individually and on behalf of her minor child, LES ANDREW KELLY,

Petitioners,

-against-

MARJORIE McLOUGHLIN, individually and as Executive Director Cardinal McCloskey Children's & Family Services, and BARBARA McMURRAY, individually and as Foster Boarding Home Director of Cardinal McCloskey Children's & Family Services, and CARDINAL McCLOSKEY CHILDREN'S AND FAMILY SERVICES, *et al.*,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Due Process Clause create a liberty interest in family integrity for a pre-adoptive foster family of unrelated individuals where the family was created, licensed, and funded by the government, and the government and its contract agency retained legal guardianship and custody until the child was adopted?

2. Does New York law create a liberty interest in family integrity for a pre-adoptive foster family of unrelated individuals where the statutes, regulations, and contract governing the relationship all make it evident that the child is in the legal custody and guardianship of the government and its contractor child-care agency, and the child may be removed from the home at any time prior to adoption if the legally responsible agencies consider removal to be in the best interests of the child?

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N.Y. Soc. Serv. Law § 383(2)

The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

N.Y. Soc. Serv. Law § 400(1)

When any child shall have been placed in an institution or in a family home by a social services official, the social services official may remove such child from such institution or family home and make such disposition of such child as is provided by law . . . .

Statute Pertaining to Status of Adopted Children

N.Y. Dom. Rel. Law § 117(1)(c)

The adoptive parents or parent and the adoptive child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from and through each other and the natural and adopted kindred of the adoptive parent or parents.

STATEMENT OF THE CASE

Andrew was born in 1990. His father was unknown, his mother abandoned him, and he was placed into the custody of the City of New York.[1] The City placed Andrew with one of its contractor agencies, respondent Cardinal McCloskey Children's & Family Services ("Cardinal McCloskey"), which arranged for Andrew to be cared for by a foster parent, petitioner Sylvia Rodriguez. In June 1993, the Family Court of the State of New York terminated Andrew's mother's parental rights and awarded legal guardianship and custody of Andrew to the City and Cardinal McCloskey (A-3).[2]

Planning for Andrew ultimately to be adopted by Rodriguez, Cardinal McCloskey and Rodriguez signed an "Adoptive Placement Agreement" stating the following:

> We are taking this child with the intention of adoption although we understand that legal

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[1] When Andrew was born, the Commissioner of Social Services of the City of New York was the official who assumed legal custody of children placed in foster care in New York City. The Commissioner is the head of respondents New York City Department of Social Services and New York City Child Welfare Administration, formerly a bureau within the City's Department of Social Services. Foster children in New York City are now placed into the custody of the Commissioner of the New York City Administration for Children's Services, a new agency. For ease of reference, the respondent City of New York and its agencies will be referred to collectively as "the City" or "municipal respondents."

[2] Numbers in parentheses preceded by an "A" refer to pages in the Appendix to the Petition for a Writ of Certiorari.

custody remains with Card. McCloskey and that this adoptive placement agreement remains in effect until the date of legal adoption.

The legal adoption will take place after both Card. McCloskey and we agree that it is in the child's best interest.

* * *

If at any time prior to legal adoption it is determined by the agency or by us that the child should be removed from our home, we will cooperate with the agency in carrying this out in a way that serves the best interest of the child in the judgement of the agency.

(A4) (quoting Adoptive Placement Agreement).

On March 18, 1994, when Andrew was four years old, a Cardinal McCloskey caseworker visited Rodriguez's home and found Andrew and a three-year-old foster child "tended only by Rodriguez's grandson Edwin Rodriguez . . ., a twelve-year-old emotionally handicapped, special-education student" (A5). Edwin "appeared to be overwhelmed" by his charges (A5). After waiting in the home for two hours, the caseworker called his office for instructions and was told to remove Andrew and Thomas (A6).

The absence of adult supervision for two foster children under ten years old violated State regulations, *see* N.Y. Comp. Codes R. & Regs. tit. 18, § 444.5(c)(3), and Cardinal McCloskey filed a child maltreatment report, which triggered a City

investigation (A6). In the meantime, Rodriguez asked the City to conduct "an independent review" of the removal and sought an administrative "fair hearing" from the State (A6). Rodriguez also sought to visit Andrew during the period of separation, but her request was denied except for a single visit held the day before the hearing.

By mid-April, the City's investigators had determined that Andrew should be returned and Rodriguez should receive training in child supervision (A6-7). Cardinal McCloskey disagreed and chose to await the City's "independent review" hearing (A7). The hearing was conducted in late June, and a decision directing Andrew's return was issued on July 11, 1994 (A7). He was returned two days later and eventually adopted.

Rodriguez filed suit in district court for herself and Andrew, claiming that the March 1994 removal, the denial of visitation without notice and a hearing, and the delay between the removal and the June 1994 hearing violated their procedural due process rights.

Respondents moved for summary judgment, arguing, *inter alia*, that as a pre-adoptive foster family, Rodriguez and Andrew had no liberty interests protected by the Constitution. The district court disagreed, ruling as a matter of law that the March 1994 removal was lawful, but that the subsequent denial of visitation without a hearing and the delay in holding a hearing to review the removal violated Rodriguez's and Andrew's constitutional rights (A8-14).

After a trial limited to damages, Rodriguez was awarded $20,000 compensatory and $10,000 punitive damages from Cardinal McCloskey and $10,000 compensatory damages from the City. Andrew was found to have suffered no damages. The jury awarded him $1 nominal damages and $10,000 punitive damages from Cardinal McCloskey plus $1 nominal damages from the City (A15).

Cardinal McCloskey and the City appealed. The court of appeals reversed the district court and dismissed the complaint, ruling that neither the Due Process Clause nor state law created a liberty interest in family integrity for Rodriguez and Andrew. The court of appeals said that this Court's opinion in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), "leads [the court] to the conclusion that any liberty interest arising in the preservation of a biologically unrelated foster family would arise, if at all, only under state law, and not under the Due Process Clause itself" (A19).

The court of appeals' analysis of state law relied largely on the principles stated in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989). The court of appeals said that "[t]o create a liberty interest, a statute or regulation must contain explicitly mandatory language, *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow" (A20) (internal quotations and citation omitted).

After reviewing the statutes and regulations under which petitioners claimed a state-created liberty interest, the court of appeals concluded that

> none of the statutory or regulatory sections called to our attention contains any substantive predicates or explicitly mandatory language giving directives to decisionmakers as to the cohabitation or visitation rights of a foster mother and child in the wake of an emergency removal of the child from the foster home. We cannot conclude that these provisions are sufficient to give plaintiffs the liberty interests they assert.

(A27).

REASONS WHY THE PETITION SHOULD BE DENIED

I. It Is Already Established that the Due Process Clause Does Not Create a Protected Liberty Interest in Family Integrity for Foster Families Composed of Unrelated Individuals Brought Together by a Government Agency that Retains Legal Custody and Guardianship of the Child.

The first question in a procedural due process case is "whether there exists a liberty or property interest which has been interfered with by the State." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). Such interests " 'may arise from two sources—the Due Process Clause itself and the laws of the States.' " *Id.* (quoting *Hewitt v. Helms*, 459 U.S. 460, 466).

It is well-settled that the Due Process Clause does not create a protected liberty interest in family integrity for unrelated individuals brought together

as a foster family by the government. Like petitioners here, the foster parents who commenced *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) ("*OFFER*"), argued that the emotional attachments that often develop between foster parents and foster children generate a constitutionally protected liberty interest in remaining together. 431 U.S. at 839.

OFFER explained that constitutional protection for family integrity is based on substantially more that the emotional attachments that can form between children and their caretakers. "[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Id.* at 843. This constitutional protection for "family privacy" flows from our conception of "intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'" *Id.* at 845 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503).

Underscoring this point, *OFFER* cited the marital relationship as an example of a non-biological relationship that is given constitutional protection, calling it "[t]he basic foundation of the family in our society," *id.*, a relationship with roots " 'older than the Bill of Rights.'".*Id.* at 843 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486).

Contrasting foster care with these time-honored family relationships, *OFFER* noted

> important distinctions between the foster family and the natural family. First, unlike the

> earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. . . . [W]hatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset.

OFFER, 431 U.S. at 845. After explaining this distinction, this Court turned its attention to whether any liberty interests were created by state law, *id.* at 846, a question it deemed unnecessary to resolve. *Id.* at 847. The court of appeals properly read this discussion as a recognition that the Due Process Clause does not create liberty interests of the kind asserted by petitioners here.

Petitioners make much of the fact that *OFFER* left open the possibility that there might be "a small liberty interest" (Pet. at 12), even for foster parents of children caring for children whose biological parents still had parental rights (*id.* at 10-12); however, it is apparent that the question considered unresolved was whether state law created a protected liberty interest.

Petitioners support their argument that the question of a Constitution-based liberty interest was left open by citing the opinion joined by three concurring Justices, who urged that the plaintiffs' assertion of a liberty interest should be rejected outright (Pet. at 12) (quoting *OFFER*, 431 U.S. at 857-58 (Stewart, J., concurring)). However, the

concurring opinion's concentration on New York's statutory scheme makes it evident that the issue viewed as left open was whether state law created a protectible liberty interest, not whether such an interest arose directly from the Due Process Clause. *OFFER*, 431 U.S. at 856-63 (Stewart, J., concurring).

OFFER is consistent with other decisions by this Court recognizing the biological roots of the constitutional protection for family relationships. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion), this Court invalidated a zoning restriction that prevented extended families from living together. The ordinance was distinguished from one previously upheld by this Court because of "the overriding factor" that the valid ordinance "affected only unrelated individuals," while East Cleveland's "slic[ed] deeply into the family itself," 431 U.S. at 498, by "select[ing] certain categories of relatives who may live together" and others who could not. *Id.* at 499. Like *OFFER*, *Moore* emphasized "that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503.

Reno v. Flores, 507 U.S. 292, 311 n.6 (1993), rejected an argument that Immigration and Naturalization Service procedures governing the release of detained juveniles to adult custodians could not make distinctions based on whether the proposed custodian was related to the detained child. "Acceptance of such a proposition would revolutionize much of our family law. Categorical distinctions between relatives and nonrelatives, and between relatives of varying degrees of affinity, have

always played a predominant role in determining child custody and in innumerable other aspects of domestic relations." *Id.*

Petitioners cite *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), as "support[ing] the principle that family is not limited to biological families" because the statute invalidated in *Pierce* prohibited any person with control of a child from having the child educated in a private school (Pet. at 13).

Petitioners are not aided by *Pierce*. The private schools that commenced the suit complained that "the enactment conflicts with the rights of parents." 268 U.S. at 532 or of "parents and guardians." *Id.* at 533. This Court's holding was that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Here, of course, Andrew was a ward of the City and Cardinal McCloskey when the events at issue occurred, not of petitioner Rodriguez.

Later decisions do not give *Pierce* the expansive interpretation urged by petitioners. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("the 'liberty' of parents to control the education of their children that was vindicated" in *Pierce*); *Moore*, 431 U.S. at 501 (plurality opinion) (citing *Pierce* as a case that addressed "traditional parental authority in matters of child rearing and education"); *Troxel v. Granville*, 120 S. Ct. 2054, 2060 (2000) (plurality opinion) (quoting *Pierce*'s holding that parents and guardians have certain rights flowing from their control over a child's life); *id.* at 2068 (Thomas, J., concurring)

(citing *Pierce* as "hold[ing] that parents have a fundamental constitutional right to rear their children").

Pierce said parents have certain rights as "a counterpart of the responsibilities they have assumed." *Lehr*, 463 U.S. at 257. *Pierce* did not recognize a constitutionally protected liberty interest for contracted caretakers who have neither a biological connection to a child nor legal guardianship. This emphasis on rights flowing from obligations is noteworthy here since petitioner Rodriguez actually had two foster children in her home, Andrew and three year-old Thomas, who was removed from the Rodriguez home with Andrew (A5-6). Thomas was never returned because petitioner Rodriguez decided she no longer wanted him (Ct. App. App. at A554-56), and neither law nor any sense of familial duty obliged Rodriguez to continue caring for that child.

Nor are petitioners aided by their citation of *Brown v. County of San Joaquin*, 601 F. Supp 653 (E.D. Cal. 1985); *Berhow v. Crow*, 423 So. 2d 371 (Fla Dist. Ct. App. 1982); or *James v. McLinden*, 341 F. Supp 1233 (D. Conn. 1969), as cases finding a "Due Process Clause-based liberty interest" in foster families (Pet. at 15).

Brown is irreconcilably at odds with this Court's precedents. Moreover, the existence of a constitutionally created liberty interest for foster families has been rejected by the Court of Appeals for the Ninth Circuit, the very court that reviews the decisions of the district court that issued *Brown*. In *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985),

the court agreed with the Court of Appeals for the Fifth Circuit that since the state creates the foster care relationship, it is a creature of legislation, not a relationship with a constitutionally derived liberty interest. 778 F.2d at 1389-90 (quoting *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977)). *Brown* alone was cited as a case opposed to that holding. *Id.* at 1390.

In *Berhow*, the dispositive fact was that the foster parents initially received custody from "the natural mother—not the state," 423 So. 2d at 373, and "were registered in [California] as [the child's] parents upon the consent of the natural mother." *Id.* at 372. The same is true for *James*, which emphasized the absence of state involvement in the relationship between the child and her caretaker, including the fact that the plaintiff "has fed and clothed [the child] from the subsistence money she received." *Id.*

These cases fall far short of holding that the Constitution creates a liberty interest in family integrity for foster parents like petitioner Rodriguez, who agreed to care for a ward of the state who was not related to her. This simply is not the historically rooted family relationship given protection by the Due Process Clause.

II. New York Law Does Not Create a Constitutionally Protected Liberty Interest in Family Integrity for Pre-Adoptive Foster Parents and Children. Until a Child Is Adopted, the Responsible Government Agency and Its Contract Agencies May Remove Any Child from His Foster Home Whenever a Removal Is in the Child's Best Interests, a Broad, Subjective Standard that Affords Substantial Discretion to the Agencies with Legal Responsibility for the Child.

The court of appeals correctly concluded that New York statutes and regulations do not give rise to any constitutionally protected liberty-interest for pre-adoptive foster care placements.

> Mere expectations do not necessarily give rise to a state-created liberty interest protected by the Due Process Clause. "[A] state creates a protected liberty interest by placing substantive limits on official discretion." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 462 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)). "[T]he most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decisionmaking . . . and further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 462 (quoting *Hewitt v. Helms*, 459 U.S. at 472 ("specified substantive predicates")). To create a liberty interest, a statute or regulation must "contain 'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker

> that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 463 (quoting *Hewitt v. Helms*, 459 U.S. at 472).

(A19-20).

In *Meachum v. Fano*, 427 U.S. 215, 226 (1976) this Court ruled that regulations governing transfers from one prison to another did not create a liberty interest because there was "no right" to stay in a particular place that was "defeasible only upon proof of specific acts of misconduct." Rather, the regulations indicated that transfers were "made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate." 427 U.S. at 225.

When the relevant New York laws are analyzed using these principles, it is apparent that they do not create any right for pre-adoptive foster families to remain intact. Three Justices concurring in the result in *OFFER* did review New York's statutes and reached precisely that conclusion.

> [T]he predicate for invoking the Due Process Clause—the existence of state-created liberty or property—was missing in *Meachum* just as it is missing here. New York confers no right on foster families to remain intact, defeasible only upon proof of specific acts or circumstances. As was true of prison transfers in *Meachum*, transfers in and out of foster families "are made for a variety of reasons and

> often involve no more than informed predictions as to what would best serve . . . the safety and welfare of the [child]." 427 U.S. at 225.
>
> Similarly, New York law provides no basis for a justifiable expectation on the part of foster families that their relationship will continue indefinitely. The District Court in this litigation recognized as much, noting that the typical foster-care contract gives the agency the right to recall the child "upon request," and commenting that the discretionary authority vested in the agency "is on its face incompatible with plaintiffs' claim of legal entitlement." 418 F. Supp. at 281. . . .
>
> This is not to say that under the law of New York foster children are the pawns of the State, who may be whisked from family to family at the whim of state officials. . . . But the protection that foster children have is simply the requirement of state law that decisions about their placement be determined in the light of their best interests. This requirement is not "liberty or property" protected by the Due Process Clause, and it confers no right or expectancy of any kind in the continuity of the relationship between foster parents and children.

OFFER, 431 U.S. at 859-61 (Stewart, J., concurring) (citations omitted) (brackets in original).

While *OFFER* involved foster care prior to termination of parental rights, not pre-adoptive placements, everything stated above applies with equal force to the discretion reposed in New York officials when deciding whether to remove a child from a pre-adoptive home.

When Andrew's natural mother's rights were terminated, his guardianship was given to the City and Cardinal McCloskey by the family court. He was still a foster child under New York law, and petitioner Rodriguez remained a foster parent. *See* N.Y. Soc. Serv. Law § 371(19). "The rights and obligations of foster parents are limited to those provided in the applicable statutes or pursuant to their contract with the placement agency." *In re Dina Michelle S.*, 653 N.Y.S.2d 677, 678 (App. Div. 1997).

Child-care agencies have broad discretion to remove children from foster homes. "The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority . . . in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded." N.Y. Soc. Serv. Law § 383(2). Thus, until adoption, "foster care 'custodians'" do not have "true custody." *Spence-Chapin Adoption Serv. v. Polk*, 274 N.E.2d 431, 434 (N.Y. 1971) (requiring foster parent to comply with agency decision to return to natural mother a child previously surrendered for adoption).

Ms. Rodriguez's adoption agreement with Cardinal McCloskey recognized that Andrew's "legal

custody" remained with Cardinal McCloskey until adoption and that the agency could remove the child; she agreed to cooperate with any such decision (A27). This was not a waiver of her procedural rights under state law to contest a removal, but it shows that Ms. Rodriguez had no expectation that she was somehow exempted from child-care agencies' statutory authority to make removals in the best interests of a child.

New York's courts protect agencies' statutory and contractual authority. In *In re Hasani B.*, 600 N.Y.S.2d 694 (App. Div. 1993), a state appellate court set aside a family court order (i) directing a local commissioner of social services to certify a child's legal guardian as a foster parent and (ii) restricting the commissioner's discretion to remove the child only to emergency situations. The court ruled that the petitioner could not be both a legal guardian and foster parent since "[a] legal guardian has exclusive control, custody and care of the children, as opposed to the status of a foster parent where the agency in foster care placement continues to exercise care, custody or guardianship of the children." 600 N.Y.S.2d at 697 (citation omitted). Similarly, the family court could not "eliminate[] respondent's statutory right to remove a child from a foster home (subject to certain procedural requirements) without prior court authorization." *Id.* at 698.

Petitioners' claim of a state-created liberty interest is heavily dependent on a host of statutes and regulations providing procedural rights to foster parents (Pet. at 1-5). The court of appeals carefully reviewed the statutes and regulations relied on by

petitioners and correctly concluded that "these sections [contain] no language providing substantive predicates for, or substantive limitations on, the exercise of official discretion with respect to matters of removal or visitation" (A25; A22-27).

Petitioners urge that the court of appeals misread a regulation, N.Y. Comp. Codes R. & Regs., tit. 18, § 421.2(b), that purportedly creates a liberty interest because it provides that removals of certain children from "the care and custody" of certain people should occur only "when it is clearly established that such action is in such child's best interest" (Pet. at 24-27). The court of appeals ruled that the regulation did not apply to pre-adoptive foster parents like petitioner Rodriguez because such foster parents do not have "custody" of a foster child, which remains with the child-care agencies until adoption (A26).

This ruling was correct, *see Spence-Chapin*, 274 N.E.2d at 434 (foster parents do not have "true custody"); *Hasani B.*, 600 N.Y.S.2d at 697, but not dispositive in any event. Even if the regulation did apply to petitioner, it does not create specific substantive predicates that channel the exercise of the discretion to remove a child from a particular home. Such decisions remain governed by the best interests of the child standard, which does not utilize the kind of specific substantive predicates that create liberty interests.

Far from creating rights and expectations for individuals that a given child is theirs to keep, New York law makes it plain that, subject to traditional protections for parental rights, agency decisions regarding child custody, planning, and adoption are

guided by the best interests of the child. This standard does not authorize a certain result only upon the occurrence of specified predicates. Rather, it mandates a wide-ranging, open-ended inquiry into the myriad of complex, subjective factors that should be considered when planning a child's future custody. Properly applied, the best interests standard is the antithesis of taking action upon the occurrence of a specific factual predicate. "The only absolute in the law governing custody of children is that there are no absolutes." *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 767 (N.Y. 1982). When courts apply the best interests standard to determine custody, "there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child." *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1262 (N.Y. 1982).

The crucial factors are far from specific. "Primary among the circumstances to be considered in determining the best interests of the child are the ability to provide for the child's emotional and intellectual development, the quality of the home environment and the parental guidance provided." *Louise E.S. v. W. Stephen S.*, 477 N.E.2d 1091, 1092 (N.Y. 1985). While continuity is an important component of any best interests assessment, no statute, regulation, or contract assures pre-adoptive foster parents that they will continue as foster parents and ultimately adopt the child absent occurrence of specific substantive predicates. The City and Cardinal McCloskey had the responsibility as Andrew's guardians to weigh the numerous factors that go into a best interests determination and make the decision that seemed wisest. The fact that such an assessment would consider continuity

of care as a factor supporting the status quo does not mean that the state created a liberty interest in continuity.

Moreover, the outcome sought by petitioners would create a legal twilight zone where there is doubt about child-care agencies' ability to make other important decisions not involving custody, such as consenting to needed medical care. As legal guardians, agencies are often called upon to make such judgments, and this ruling raises the prospect that pre-adoptive foster parents asserting parent-type liberty interests will claim some right to control or participate in that process. This outcome is both undesirable and plainly not intended by New York law. *See Hasani B.*, 600 N.Y.S.2d at 698 (criticizing order allowing caretaker to be both foster parent and legal guardian because it "raises the possibility of a clash between the authority of petitioner as legal guardian and the statutory responsibility of the [agency]").

Nor is there any conflict between the court of appeals' ruling here and those of other circuits. The erroneous constitutional holdings of the district court in *McLaughlin v. Pernsley*, 693 F. Supp 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989) (Pet. Br. at 17-19), are not holdings of the Third Circuit Court of Appeals. The district court found that a race-based transfer of a foster child violated the plaintiffs' equal protection and due process rights. The latter finding was based on the governmental defendant's failure to follow a regulation providing certain foster parents with procedural protections. 693 F. Supp. at 325-27. The district court held that the foster parents "did not

receive any of these procedural rights entitled to them under this regulation by virtue of the Due Process Clause. Under these circumstances, this Court is obligated to find that the Department of Human Services' conduct violated plaintiffs' due process rights." *Id.* at 327. Since it is well-settled that procedural requirements do not create constitutionally protected interests, *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983), the district court's ruling was erroneous.

Petitioners label as a "specific substantive predicate[]," a provision in the Pennsylvania regulations at issue in *McLaughlin* making them applicable only to " 'qualified' foster parents" (Pet. at 18), but a definition of the group of people entitled to procedural rights is not a substantive predicate. The regulation did not attempt to spell out the predicate facts that would lead to a child's removal from a foster home.

In any event, the court of appeals did not address these issues. The government did not appeal in *McLaughlin*, 876 F.2d at 312, and the court of appeals emphasized that it was not reviewing the district court's "unchallenged" analysis of the constitutional issues. *Id.* at 318. In passing, it is noteworthy that a district court with such an expansive view of state-created liberty interests nevertheless cited *OFFER* for the proposition that an argument for a liberty interest arising "from the Due Process Clause itself . . . might have little force." 693 F. Supp at 325 (citation omitted).

Nor is there a conflict between the court of appeals' decision here and other decisions cited by

petitioners as evincing use of the supposedly "less restrictive 'expectations of permanency' test in the foster care removal context" (Pet. at 20). Two of the three cited decisions, *Thelan v. Catholic Soc. Servs.*, 691 F. Supp 1179 (E.D. Wis. 1988), and *Brown*, 601 F. Supp 653 (Pet. at 21), are district court opinions, not those of a court of appeals, and as previously noted, *Brown*'s reasoning has been rejected by the court of appeals for the circuit where the *Brown* court sits (*supra* pp. 11-12). And as petitioners acknowledge, *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989), did not "explicitly decid[e] whether the plaintiff preadoptive foster family had a liberty interest in their relationship" (Pet. at 20).

Finally, Andrew had no independent liberty interest in remaining in the Rodriguez home. The fact that a child might be harmed by an improvident change in custody does not create a constitutionally protected liberty interest in the status quo. *OFFER*, 431 U.S. at 840; *see also Reno*, 507 U.S. at 304-05. In the context of temporary foster care placements, one court of appeals has held that young foster children like Andrew do not have a constitutionally protected "stability interest." *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1208 (5th Cir. 1977)

> [T]he state's motive in interrupting [the child's] environment at any point was always to move him to a place which it considered superior, over the long range, for his particular needs at the time. Since [the child] can point to no source for a right in conflict with that state program, we hold that [the child] has no liberty interest as asserted here.

563 F.2d at 1209. New York's child-care statutes also focus on a child's best interests and did not create any expectation for Andrew that his interests would best be served in any particular manner (*supra* pp. 16-20).

This is not to say that child-care agencies always know best and are empowered to exercise unrestrained discretion. New York provides ample avenues for administrative and judicial review of agency decisions so that the goal of serving a child's best interests can be achieved in as high a percentage of cases as possible. *See, e.g.*, N.Y. Soc. Serv. Law §§ 392, 400; N.Y. Fam. Ct. Act § 1055.

In this very case, New York's review procedures led to a decision returning Andrew to petitioner Rodriguez's home after a full investigation determined that the inadequate supervision that led to his removal was not a recurring problem. The jury's award of $1 nominal damages to Andrew belies any claim that he was devastated by these events.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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